

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
December 15, 2005 Session

**SANDRA ELAINE HELTON (BUSCHER) v. SHAUN EDWARD HELTON**

**Appeal from the Circuit Court for Davidson County  
No. 96D-1125 Muriel Robinson, Judge**

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**No. M2005-00268-COA-R3-CV - Filed February 24, 2006**

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This post-divorce case presents the question of whether the trial court correctly interpreted and enforced a provision in the parties' marital dissolution agreement (MDA) providing that if Sandra Elaine Buscher relocated from Davidson County or counties adjacent to Davidson, she agreed to "pay all expenses necessary for Husband [Shaun Edward Helton] to maintain the same visitation" with their child as originally agreed in the MDA. On remand from this court, the trial court allowed Ms. Buscher to relocate with the child to Jackson, Mississippi, and awarded Mr. Helton visitation comparable to that which he originally received. The trial court, however, did not require Ms. Buscher to pay for Mr. Helton's costs of traveling to Mississippi to exercise all of his visitation. Mr. Helton appealed. We modify the trial court's judgment to provide that Ms. Buscher shall be responsible for such costs as are reasonable and necessary for Mr. Helton to exercise the same amount of visitation as before Ms. Buscher's move, pursuant to the MDA's terms. We affirm the trial court's judgment in all other respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as  
Modified; Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Jeffrey L. Levy, Nashville, Tennessee, for the Appellant, Shaun Edward Helton.

David W. Garrett, Nashville, Tennessee, for the Appellee, Sandra Elaine Helton (Buscher).

**OPINION**

***I. Factual and Procedural Background***

This is the second time this case has come before us. In the first appeal, we set forth the following factual background, in part pertinent to this appeal:

On May 29, 1997, the Fourth Circuit Court of Davidson County granted a divorce to Sandra Elaine Helton on the ground of irreconcilable differences. The Final Decree incorporated a Marital Dissolution Agreement signed by both parties. Its terms included joint custody of Samuel Luke Helton, the parties' four year old son, with the wife to have primary physical custody, and the husband to enjoy overnight visitation every weekend, with additional visitation during the week, and five weeks of uninterrupted visitation during the summer. The husband also agreed to pay child support of \$650 per month, a downward deviation from the guidelines which was justified by his extended visitation. The relocation clause of the MDA (entitled "Jurisdiction") reads as follows:

Wife has solemnly promised that she will continue to live in Davidson County or adjoining counties and will not move and take the child with her under any circumstances. Husband has based his decision to sign this Agreement and forego a hearing on the merits as to custody on that promise. Wife hereby again promises not to move the child from Davidson or adjoining counties without Husband's written permission. Wife hereby acknowledges that it is in the manifest best interest of Luke that he remain and be raised in Metro-Davidson County or contiguous counties near his father. Should wife decide to move from these counties, she agrees to proceed in the following order:

- A. Notify Husband and fully inform him of all the details.
- B. Pay any attorney fees or other costs incurred by Husband as a result of her decision.
- C. Should she move with the child from Davidson or adjoining counties, Wife agrees to pay all expenses necessary for husband to maintain the same visitation with child as agreed in Section 2.

*Helton v. Helton*, No. M2002-02792-COA-R3-CV, 2004 WL 63478 at \*1-2, 2004 Tenn. App. LEXIS 20 at \*2-4 (Tenn. Ct. App. M.S., filed Jan. 13, 2004)(“*Helton I*”). The *Helton I* court noted that “both Ms. Helton’s attorney and the trial court advised her against agreeing to the extended visitation and to the relocation clause, because of the likelihood of later complications.” *Id.*

In *Helton I*, the trial court, when presented with Mr. Helton’s petition to prevent Ms. Buscher from relocating to Mississippi, enforced the relocation provision of the MDA, declaring that if Ms.

Buscher “chose to join her husband in Mississippi, the father would be named as the primary custodial parent.” On appeal, this court held that the trial court “should have applied Tenn. Code Ann. § 36-6-108 in resolving the petition to prevent relocation.” *Helton I*, 2004 WL 63478 at \*6. We remanded the case for a determination of whether the parties actually spent substantially equal time with the child, pursuant to the statute.

Upon remand, the trial court answered that question in the negative and allowed Ms. Buscher to relocate to Mississippi with the child. The trial court then entered an order incorporating an amended parenting plan that set forth, among other things, the revised visitation schedule. The trial court awarded Mr. Helton \$3,000 in attorney fees.

## ***II. Issues Presented***

Mr. Helton appeals, raising the following issues, as quoted from his brief:

1. Whether the trial court erred by failing to enforce provisions for the wife to pay the attorney fees and other costs incurred by the husband as a result of her decision to relocate, as well as the expenses that he may have to incur in order to maintain the same level of visitation.
2. Whether he is entitled to his costs relative to this appeal, including reasonable attorney fees.

Ms. Buscher raises the additional issues of whether the trial court erred in failing to award her attorney fees incurred as a result of her petition for criminal contempt against Mr. Helton, and whether she is entitled to attorney fees incurred due to this appeal.

## ***III. Standard of Review***

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

## ***IV. MDA Relocation Provision***

Mr. Helton's primary issue on appeal relates to the MDA provision stating that “[s]hould she move with the child from Davidson or adjoining counties, Wife agrees to pay all expenses necessary for husband to maintain the same visitation with child as agreed in Section 2.” Mr. Helton argues that the amended parenting plan approved by the trial court on remand provides him with less visitation than did the original MDA. Mr. Helton further asserts that in order for him to enjoy as

much visitation as he had before, he is forced to pay for monthly trips to Mississippi, pursuant to the provision in the amended parenting plan stating that “Father shall also be allowed to visit with the child one weekend per month in Jackson, Mississippi, at Father’s expense.”

In *Helton I*, the court stated as follows regarding the MDA provisions primarily at issue here:

The disputed paragraph in the Marital Dissolution Agreement includes provisions for the wife to pay the attorney fees and other costs incurred by the husband as a result of her decision to relocate, as well as the expenses that he may have to incur in order to maintain the same level of visitation, in the event that she does actually relocate. We do not believe there is anything in Tenn. Code Ann. § 36-6-108 that would prevent the courts from enforcing these provisions. These provisions do not deal with the care, custody or control of the child and, consequently, remain enforceable as contractual provisions. *See Hogan v. Yarbrow*, No. 02A01-9905-CH-00119,-1999 WL 1097983 (Tenn.Ct.App. Oct. 5, 1999) (no Tenn. R.App. P. 11 application filed) (holding that portion of MDA regarding attorneys fees incurred in enforcing the agreement retained its contractual nature.)

While Ms. Buscher does not raise the question of attorney fees on appeal, we think it would be helpful to state that even though Tenn. Code Ann. § 36-6-108 prevails over conflicting provisions of the MDA, that does not negate the portions of the MDA that deal with the allocation of the financial burdens incident to relocation, including the question of costs incurred for visitation.

*Helton I*, 2004 WL 63478 at \*9.

Having determined in *Helton I* that the MDA provision whereby Ms. Buscher agreed to pay expenses necessary for Mr. Helton to maintain the same level of visitation as before her move is enforceable, we must now determine whether his assertion that he is receiving less visitation than before is correct. Upon remand, the trial court held that the child was spending approximately 70% of his time with Ms. Buscher, and 30% with Mr. Helton. This ruling has not been challenged by either party on appeal. Thus, we find that under the terms of the original MDA, Mr. Helton was exercising 109 days per year of visitation, or 30% of 365 days.

Neither party has included in his or her brief an argument or analysis of how many days of visitation Mr. Helton is allowed under the amended parenting plan. The plan provides for visitation as follows in relevant part:

## 2.1 WEEKEND VISITATION:

Father will visit with child during the school year on the 3<sup>rd</sup> weekend of the following months from 6:00 p.m. on Friday until 6:00 p.m. on

Sunday:

January

March

May

September

Father shall also be allowed to visit with the child one weekend per month in Jackson, Mississippi, at father's expense. Father shall give mother one week's notice if he intends to exercise visitation in Mississippi.

In odd numbered years when Father does not have Thanksgiving with the child, he shall visit with the child on the 2<sup>nd</sup> weekend of November from 6:00 p.m. on Friday until 6:00 p.m. on Sunday.

## 2.2 SUMMER SCHEDULE.

Father shall have the child for the months of June, July and the first week of August. In the event the child's school is not out before June 1<sup>st</sup>, Father's visitation shall begin two (2) days after the child is out of school. Mother shall have visitation with the child on a middle weekend of June from Friday at 6:00 p.m. until Sunday at 6:00 p.m. Mother shall also be awarded the Fourth of July if it falls on a weekend. This visitation is to be exercised in Nashville. If it does not fall on a weekend, she shall not have visitation with the child on Fourth of July.

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Thanksgiving: In even numbered years, Father shall have the child from 6:00 p.m. on Wednesday through Sunday at 6:00 p.m. In odd numbered years, Mother shall have the child from 6:00 p.m. on Wednesday through Sunday at 6:00 p.m.

Christmas: In even numbered years, Father shall have the child beginning at 6:00 p.m. the day school is out until December 24, 2004 [sic] at 10:00 p.m. In even numbered years, Mother shall have the child from December 24, 2004 [sic] at 10:00 p.m. until January 2, 2004 [sic] at 6:00 p.m.

In odd numbered years, Mother shall have the child beginning at 6:00 p.m. the day school is out until December 24. . .at 10:00 p.m. In odd numbered years, Father shall have the child from December 24. . .at 10:00 p.m. until January 2. . .at 6:00 p.m.

The amended parenting plan further provides that the parties will alternate visitation for the holidays of Easter, spring vacation, Memorial Day, and Labor Day, and that Mr. Helton will have visitation every Father's Day.

By our calculation, this plan provides Mr. Helton with approximately 94 days per year of visitation, excluding the "optional" weekends in Mississippi at his own expense. Under the contractual terms of the MDA, we believe the judgment of the trial court should be modified to provide Mr. Helton an additional weekend of visitation in the months of January, February, March, April, September, October, and November, with Ms. Buscher responsible for reasonable and necessary expenses for his exercise of this visitation. This additional 14 days of visitation per year provides Mr. Helton with roughly the same level of visitation as he enjoyed prior to Ms. Buscher's move from Davidson County. We are further of the opinion that as regards these seven weekends per year, Ms. Buscher shall have the option to bring their child to Davidson County for visitation at Mr. Helton's home, should she so choose. Given the parties' nine-year history of litigation subsequent to the divorce decree, and in an effort to save them the potential expense of a *Helton III* appeal, we emphasize and caution Mr. Helton that if Ms. Buscher does not choose to bring the child to Mr. Helton's home, then Ms. Buscher shall only be responsible for those expenses that are *reasonable* and *necessary* to enable his visitation.

#### ***V. Attorney Fees***

In the trial court's final judgment prior to *Helton I*, entered on October 22, 2002, the court awarded Mr. Helton \$3,500 in attorney fees. Mr. Helton appealed to this court, but did not raise the issue of attorney fees in *Helton I*. He now attempts to raise the issue of whether the trial court should have awarded him more attorney fees in *Helton I*. Because Mr. Helton did not raise this issue on the first appeal, the trial court's judgment awarding him \$3,500 in attorney fees has long become final and not subject to modification, absent grounds provided in Tenn. R. Civ. P. 60.02, none of which he has alleged in this case. This issue is without merit.

Mr. Helton also argues that the trial court should have awarded him more attorney fees than the \$3,000 he received for expenses incurred in the trial court upon remand. He asserts that the total bill for his attorney fees in this regard was \$5,300. Ms. Buscher argues that no affidavit attesting to this \$5,300 figure is contained in the record, nor was there a showing that this fee was reasonable and necessary. The Supreme Court has recently stated, however, that "reversal of a fee award is not required merely because the record does not contain proof establishing the reasonableness of the fee," and that "a trial judge may fix the fees of lawyers in causes pending or which have been determined by the court, with or without expert testimony of lawyers and with or without a prima facie showing by plaintiffs of what a reasonable fee would be[.]" *Kline v. Eyrich*, 69 S.W.3d 197,

210 (Tenn. 2002); *see also Khan v. Khan*, 756 S.W.2d 685, 696-97 (Tenn. 1988). But it is equally clear that “[t]he allowance of attorney’s fees is largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion.” *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005)(quoting *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995)).

In this case, the trial court expressly stated that “the basis that I have concluded the [\$3,000] fee award was reasonable was based on the time that I considered was necessary to prepare this case.” We do not find that the trial court’s award of \$3,000 in attorney fees was an abuse of its discretion.

Ms. Buscher argues that the trial court erred by failing to award her attorney fees incurred as a result of her petition for criminal contempt against Mr. Helton. We likewise do not find the trial court erred in the exercise of its discretion regarding Ms. Buscher’s attorney fees.

Lastly, each of the parties seeks an award of attorney fees on appeal. Generally, “[a]n award of attorney’s fees on appeal is inappropriate when both parties to the appeal are partially successful.” *Philips v. Philips*, No. M1999-00212-COA-R3-CV, 2000 WL 1030625 at \*9 (Tenn. Ct. App. W.S., filed July 27, 2000). We hold each party should be responsible for his or her own fees on appeal in this case.

## ***VI. Conclusion***

The judgment of the trial court is modified to delete the provision of the amended parenting plan stating that “Father shall also be allowed to visit with the child one weekend per month in Jackson, Mississippi, at Father’s expense,” and inserting a provision for Mr. Helton’s seven additional weekends per year of visitation as set forth in this opinion. The trial court’s judgment is affirmed in all other respects. This case is remanded for collection of costs below and other necessary action consistent with this opinion. Costs on appeal shall be divided equally between the parties.

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SHARON G. LEE, JUDGE